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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF CALIFORNIA
11 SACRAMENTO DIVISION
12

13 **LETRINH HOANG, D.O., PHYSICIANS**
14 **FOR INFORMED CONSENT, a not-for**
15 **profit organization, and CHILDREN'S**
16 **HEALTH DEFENSE, CALIFORNIA**
17 **CHAPTER, a California Nonprofit**
18 **Corporation,**

19 Plaintiffs,

20 v.

21 **ROB BONTA, in his official capacity as**
22 **Attorney General of California, and ERIKA**
23 **CALDERON, in her official capacity as**
24 **Executive Officer of the Osteopathic**
25 **Medical Board of California ("OMBC"),**

26 Defendants.
27
28

Case No. 2:22-cv-02147-WBS-AC

OPPOSITION TO PLAINTIFFS'
MOTION FOR LEAVE TO AMEND

Date: November 13, 2023
Time: 1:30 p.m.
Dept: 5
Judge: The Honorable William B.
Shubb
Trial Date: Not scheduled
Action Filed: 12/01/2022

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INTRODUCTION

This case is one of several suits brought challenging AB 2098, which made it unprofessional conduct for a doctor to disseminate misinformation or disinformation about Covid-19 to patients in their care. *See* Cal. Bus. & Prof. Code § 2270. Plaintiffs in these matters have generally alleged that AB 2098 violates doctors’ First Amendment rights to speak to their patients and that AB 2098 is unconstitutionally vague. After bringing this suit, plaintiffs Dr. Letrinh Hoang and Children’s Health Defense, California Chapter sought a preliminary injunction of California Business and Professions Code section 2270. This Court granted the motion, finding that the language of section 2270 was unclear and plaintiffs were likely to succeed on their due process challenge. This matter is currently set for briefing on cross-motions for summary judgment, with hearing on the motions set for January 2024.

Intervening events have now overtaken this matter. In September 2023, the California Legislature amended SB 815 with language to repeal section 2270. The Governor signed SB 815 on September 30, 2023. Business and Professions Code section 2270 is effectively repealed, and once SB 815 goes into effect on January 1, 2024, section 2270 will no longer be California law. Hence, this case—and the related *Høeg* matter—will be moot. *See, e.g., Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc) (“[T]he repeal, amendment, or expiration of legislation will render an action challenging the legislation moot, unless there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar it.”).

Despite this impending mootness, plaintiffs now seek to postpone the current summary judgment briefing schedule and amend their complaint. Their proposed amended complaint seeks to add additional plaintiffs and an additional defendant (the Medical Board), re-raise two of their challenges to AB 2098 and raise another amorphous challenge to any enforcement actions undertaken by the Osteopathic Medical Board (or the newly proposed defendant Medical Board) involving a physician’s advice to patients in their care concerning Covid-19.

Defendants do not oppose plaintiffs’ request to stay or postpone summary judgment briefing. Given that this action will soon be moot, it furthers judicial economy to postpone any

1 further litigation related to the merits of this action and to dismiss the case as moot on January 1,
2 2024 when SB 815 goes into effect.

3 Defendants do, however, oppose plaintiffs’ attempt to supplement or amend their
4 complaint. The legal dispute between the parties in this matter has effectively been resolved by
5 the repeal of the underlying statute challenged in this action. Any attempt to revive claims
6 challenging section 2270 as plaintiffs seek to do, would be futile given the section’s repeal.
7 Should plaintiffs wish to challenge any other statutes or any particular enforcement actions, the
8 proper avenue would be a new suit that provides defendants with notice of the specific statute or
9 action plaintiffs seek to challenge and the basis plaintiffs have for doing so. At bottom, plaintiffs
10 seek to avoid the inevitable fact that this case will be indisputably moot once SB 815 takes effect
11 on January 1, 2024. The Court should deny their motion for leave to amend.

12 BACKGROUND

13 In light of the prior proceedings in this matter and the nature of the motion currently before
14 the Court, defendants will provide only a brief background here. Plaintiffs brought suit
15 challenging AB 2098, which provides that “[i]t shall constitute unprofessional conduct for a
16 physician and surgeon to disseminate misinformation or disinformation related to COVID-19,
17 including false or misleading information regarding the nature and risks of the virus, its
18 prevention and treatment; and the development, safety, and effectiveness of COVID-19
19 vaccines.” 2022 Cal. Stat., ch. 938 (“AB 2098”), § 2(a) (codified at Cal. Bus. & Prof. Code
20 § 2270(a)). The statute took effect on January 1, 2023.

21 In their Complaint, plaintiffs brought suit against California Attorney General Rob Bonta
22 and Executive Director of the Osteopathic Medical Board of California Erika Calderon, in their
23 official capacities. Plaintiffs contended that AB 2098 violated the First Amendment and was
24 unduly vague under the Fourteenth Amendment. *See* Compl. ¶¶ 46-62 (First Amendment claim),
25 ¶¶ 63-75 (due process claim). They requested a declaratory judgment that AB 2098 violated both
26 constitutional provisions and injunctive relief enjoining the enforcement of AB 2098. *Id.*, at p.
27 19. Plaintiffs also filed a motion seeking a preliminary injunction to enjoin AB 2098. *See Hoang*
28 *v. Bonta*, -- F. Supp. 3d. --, 2023 WL 414258, at * 12 (E.D. Cal. Jan. 25, 2023). This Court

1 granted the motion on January 25, 2023, holding that plaintiffs were likely to succeed in their due
 2 process challenge to AB 2098 and enjoining enforcement of AB 2098. *See id.* The parties are
 3 currently set to brief cross-motions for summary judgment, with a hearing on the motions set for
 4 January 2024. *See* ECF No. 41.

5 Since the Court ruled on the preliminary injunction motion and set a briefing for cross-
 6 motions for summary judgment, the factual situation has shifted. In September 2023, the
 7 Legislature passed and the Governor signed SB 815. *See* 2023 Cal. Stat., ch. 294 (“SB 815”).
 8 Among other provisions, SB 815 repeals California Business and Professions Code section 2270.
 9 *Id.* § 19.¹ SB 815 will take effect on January 1, 2024. After that time, California Business and
 10 Professions Code section 2270 is unenforceable and will no longer have any legal effect.

11 In response to this repeal, plaintiffs have now filed a motion to stay the current briefing
 12 schedule and to file an amended complaint. Their proposed First Amended Complaint (“FAC”)
 13 seeks to add several additional plaintiffs and one additional defendant. Plaintiffs also seek to
 14 revive their challenges to section 2270. *See, e.g.*, FAC, ¶ 79 (seeking declaration Business &
 15 Professions Code § 2270 violates the First Amendment), ¶ 92 (seeking declaration that Business
 16 & Professions Code § 2270 violates plaintiffs’ due process rights). They additionally request
 17 declaratory relief “that it is a First Amendment violation for the medical boards of California to
 18 investigate, prosecute or sanction physicians based on information and opinions they provide to
 19 patients concerning the safety and efficacy of Covid vaccines, FDA approved drug treatments for
 20 Covid whether on or off label, or public health measures such as the benefits of masks, as long as
 21 there is some published scientific evidence supporting the information and opinions.” *Id.* ¶ 74.
 22 In making this request, plaintiffs do not identify any particular statutory authority other than
 23 section 2270 that they are challenging, nor do they allege any specific Board action (past or
 24 present) they are challenging or seek to enjoin or review.

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 28 ¹ The full text of SB 815 can be found online at
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB815.

LEGAL STANDARD

While plaintiffs’ motion is framed as one to amend under Rule 15(a), it is more properly construed as one seeking leave to file a supplemental pleading under Rule 15(d). Under Rule 15(d), a “court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” In other words, “Rule 15(d) provides a mechanism for parties to file additional causes of action based on facts that didn’t exist when the original complaint was filed.” *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 874 (9th Cir. 2010). Rule 15(a), in contrast, provides a mechanism to amend a complaint with respect to events that occurred *prior to* its filing. *See id.* (distinguishing two motions); *Sywula v. Teleport Mobility, Inc.*, -- F. Supp. 3d. --, 2023 WL 362504, at *10 (S.D. Cal. Jan. 23, 2023) (same).

Here, plaintiffs seek to introduce new facts and events that occurred *after* the filing of their original complaint, such as the repeal of AB 2098 (codified at California Business and Professions Code section 2270). *See, e.g.*, FAC at ¶ 12 (discussing repeal of AB 2098), ¶ 30 (referencing statements made after complaint was filed to support standing allegations), p.17, ¶ 50 (alleging repeal of AB 2098), p. 17, ¶¶ 51-52 (discussing article and statements regarding repeal), ¶ 53 (alleging accusation brought by Board after original complaint was filed), ¶ 65 (quoting post made on social media in September 2023). And plaintiffs raise claims that are expressly predicated on these new facts and events. *See, e.g., id.* at ¶ 73 (referencing accusation brought after original complaint was filed to support first claim), ¶ 78 (referencing statements made after original complaint filed to support second claim). Because plaintiffs expressly allege and rely on facts and events that occurred while this litigation was pending, their motion is properly characterized as one to supplement their pleadings under Rule 15(d).

Rule 15(d), in contrast to Rule 15(a), does not permit a plaintiff to supplement a complaint as a matter of right; rather, it requires the court to grant leave to supplement. *Compare* Fed. R. Civ. P. 15(a), *with* Fed. R. Civ. P. 15(d). While “[s]upplementation is generally favored because it promotes judicial economy and convenience,” *Lyon v. U.S. Immigration & Customs Enforcement*, 308 F.R.D. 203, 214 (N.D. Cal. 2015), supplementation “cannot be used to

1 introduce a ‘separate, distinct and new cause of action,’” *Planned Parenthood of Southern*
 2 *Arizona v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997) (per curiam). Courts generally apply the
 3 same standards for a Rule 15(a) motion to a Rule 15(d) motion. *Lyon*, 308 F.R.D. at 214. This
 4 analysis is commonly guided by five factors: 1) undue delay, 2) bad faith or dilatory motive by
 5 the movant, 3) repeated failure of previous amendments, 4) prejudice to the opposing party, and
 6 5) futility of amendment. *Id.*

7 **ARGUMENT**

8 While defendants do not oppose postponing the current briefing schedule, they do oppose
 9 any attempt to supplement the complaint. To the extent that plaintiffs seek to raise claims
 10 challenging section 2270, supplementation would be futile and should be denied. To the extent
 11 plaintiffs now seek to insert new claims into this litigation involving other statutory provisions or
 12 other Board actions, supplementation is improper.

13 **I. SUPPLEMENTATION WOULD BE FUTILE**

14 Insofar as plaintiffs seek to challenge section 2270, the Court should deny plaintiffs’ motion
 15 for one simple reason: supplementation would be futile. This statutory provision has been
 16 repealed, and, on January 1, 2024, it will be removed from the California Business and
 17 Professions Code and have no legal effect. Any claims challenging section 2270—as the
 18 proposed amended complaint intends to do—are, or shortly will be, moot.

19 The mootness doctrine, drawn from the case-or-controversy requirement of Article III,
 20 “requires that an actual, ongoing controversy exist at all stages of federal court proceedings.”
 21 *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1086 (9th Cir. 2011). A case becomes moot “when
 22 the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the
 23 outcome.” *Id.* (citation omitted). Case law is clear that the repeal of a statute suffices to moot a
 24 challenge to that statute. *E.g., Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941
 25 F.3d 1195, 1199 (9th Cir. 2019) (en banc). As the Ninth Circuit has explained, “the repeal,
 26 amendment, or expiration of legislation will render an action challenging the legislation moot,
 27 unless there is a reasonable expectation that the legislative body will reenact the challenged
 28 provision or one similar to it.” *Id.* The party asserting that a case is *not* moot bears the burden of

1 showing “such a reasonable expectation exists . . . in the record . . . rather than on speculation
 2 alone.” *Id.* And courts “should assume that a legislative body is acting in good faith in repealing
 3 or amending a challenged legislative provision.” *Id.*

4 Plaintiffs have come nowhere close to carrying their burden to demonstrate that the claims
 5 they wish to re-assert challenging AB 2098 are not moot in light of the repeal of California
 6 Business and Professions Code section 2270. Nowhere in their proposed amended complaint do
 7 they allege facts showing that section 2270 is about to be re-enacted, such as by identifying a
 8 proposed bill re-introducing the same or a similar statutory provision. Nor do they allege any
 9 facts showing even an interest in re-enacting the language of section 2270 on the part of the
 10 Legislature. Indeed, the one legislator (AB 2098’s sponsor) they quote seems to have *no*
 11 intention of re-enacting the repealed statute. *See* FAC at p. 17, ¶ 52. Nor can plaintiffs’
 12 conclusory allegations about what they believe the *Boards* intend to do provide any insight into
 13 what the *Legislature* intends to do. In sum, plaintiffs point to nothing more than an unwarranted
 14 speculation that section 2270 might potentially be re-enacted in some future legislative session.
 15 This is insufficient to avoid mootness. Because such challenges are or soon will be moot, this
 16 Court will lack jurisdiction to adjudicate the merits of section 2270’s validity. Supplementation
 17 would therefore be futile and should be denied.

18 **II. PLAINTIFFS IMPROPERLY SEEK TO SUPPLEMENT THEIR COMPLAINT TO RAISE A** 19 **NEW CLAIM**

20 To the extent that plaintiffs instead seek to raise some other challenges or claims in their
 21 amended complaint—though their complaint is somewhat unclear on what specific Board actions
 22 or statutory authority they are challenging—supplementation should still be denied. Such claims
 23 are not the proper subject of supplementation and should be brought in separate suits.

24 The Ninth Circuit’s decision in *Planned Parenthood of Southern Arizona v. Neely*, 130 F.3d
 25 400 (9th Cir. 1997) (per curiam), is illustrative as to why supplementation with new claims would
 26 be improper. In *Neely*, the plaintiffs filed a lawsuit challenging an Arizona statute requiring
 27 parental consent for minors to obtain an abortion. 130 F.3d at 401. The district court found the
 28 statute unconstitutional and issued a permanent injunction. *Id.* at 402. Thereafter, Arizona

1 amended and re-enacted the challenged state statute. *Id.* The plaintiffs sought leave to
 2 supplement their complaint to add a claim challenging the re-enacted statute. *Id.* The Ninth
 3 Circuit held that the district court had abused its discretion in granting leave to supplement. *Id.* at
 4 403. The court explained that “[w]hile leave to permit supplemental pleading is favored, it cannot
 5 be used to introduce a separate, distinct and new cause of action.” *Id.* at 402 (cleaned up).
 6 Plaintiffs’ supplemental complaint “involved a new and distinct action that should have been the
 7 subject of a separate suit.” *Id.* While “both the original suit and the supplemental suit sought to
 8 challenge Arizona’s parental consent law, the supplemental complaint challenged a different
 9 statute” than the original suit. *Id.* Furthermore, the court explained that allowing
 10 supplementation “did not serve to promote judicial efficiency” because “there would necessarily
 11 be two actions” and that there was no obstacle “to plaintiffs bringing a new, separate action to
 12 challenge” the new statute. *Id.* Thus, the Ninth Circuit held, it was an abuse of discretion to
 13 allow supplementation rather than requiring plaintiffs to bring a separate suit. *Id.* at 403.

14 The decision in *Neely* guides the outcome here. As in *Neely*, the original statute that
 15 plaintiffs have challenged— California Business and Professions Code section 2270 (AB 2098)—
 16 has been repealed. And just like the plaintiffs in *Neely*, plaintiffs here seek to bring what is in
 17 essence “a new and distinct action” that instead should be “the subject of a separate suit.” *Neely*,
 18 130 F.3d at 402. To the extent that plaintiffs are not simply re-raising their now-moot challenges
 19 to the substance of AB 2098, they appear to now seek to challenge the Boards’ other statutory and
 20 enforcement authority. These are distinct legal disputes to distinct legal provisions, not a mere
 21 continuation of this suit. After all, adjudicating those disputes will be functionally the same as
 22 adjudicating a new case, just as in *Neely*, because plaintiffs’ prior arguments and this Court’s
 23 prior analysis cannot simply be imported into any new challenge. For instance, consider
 24 vagueness. The arguments raised in this case have turned on the particular textual language of
 25 section 2270; similarly, this Court’s ruling on the preliminary injunction motion focused on the
 26 specific language in and linguistic structure of section 2270. *See, e.g., Hoang*, 2023 WL 414258,
 27 at *8-9 (discussing lack of clarity in the phrase “contemporary scientific consensus”). Thus,
 28 whether or not section 2270 is impermissibly vague says little about whether some separate

1 statutory provision is also vague; other potential statutes plaintiffs may intend to challenge likely
 2 would not include the same language as or a similar structure to that of section 2270. In addition,
 3 challenges to other Board actions or statutory provisions could present entirely new legal issues
 4 not present in this matter. For instance, a claim seeking to challenge an ongoing Board
 5 enforcement proceeding would raise issues with respect to the limitations on a federal court's
 6 power to enjoin ongoing state enforcement proceedings under *Younger v. Harris*, 401 U.S. 37
 7 (1971). As these examples illustrate, the arguments advanced in this case are focused *on*
 8 *challenging AB 2098 specifically* and cannot be automatically mapped onto a challenge to an
 9 alleged Board “agenda” or to actions the Boards might take under different statutory authority.

10 At the end of the day, this is not a situation where plaintiffs seek to supplement their
 11 Complaint with new claims that are merely a continuation of the same legal challenge. This is
 12 not akin to a case where, for instance, a plaintiff seeks to supplement the complaint in a suit
 13 challenging conditions in detention facilities to include a new detention facility opened during the
 14 pendency of suit,² or seeks to add a claim related to a new interpretation and application of the
 15 challenged statute,³ or seeks to challenge actions taken by the defendant that the plaintiff alleges
 16 seek to contravene a judgment entered in the matter.⁴ Rather, plaintiffs seek to “effectively start[]
 17 afresh a litigation that the defendant had reason to believe was nearing its end.” *Sywula*, 2023
 18 WL 362504, at *11. And they seek to do so by challenging *distinct* Board actions that might take
 19 place under a *distinct* legal authority and involve *distinct* legal questions. Such claims should be
 20 addressed in a distinct lawsuit.

22 ² See *Lyon*, 308 F.R.D. at 214 (allowing supplementation where plaintiffs learned a new
 23 detention facility had opened during the pendency of their suit challenging detention conditions,
 investigated the facility, and agreed to extend discovery).

24 ³ See *San Luis & Delta-Mendota-Water Auth. v. U.S. Dep’t of Interior*, 236 F.R.D. 491, 499
 25 (E.D. Cal. 2006) (allowing supplementation where plaintiff sought to add claim challenging
 26 “subsequent administrative interpretations and implementation of the same statutory provision in
 a later water year” and distinguishing *Heely* since the supplementation involved the exact same
 statutory provision challenged in the original complaint).

27 ⁴ See *Neely*, 130 F.3d at 403 (distinguishing cases where supplementation was proper as
 28 involving the situation where the lower court retained jurisdiction to oversee enforcement of a
 final judgment that “required the parties to comply with broad, aspirational directives” and
 plaintiffs alleged “specific attempts by the defendants to contravene the courts' earlier rulings”).

CONCLUSION

For the foregoing reason, plaintiffs' motion for leave to amend their complaint should be denied.

Dated: October 16, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: ***Hoang, et al. v. Bonta, et al.***

Case No. **2:22-cv-02147-WBS-AC**

I hereby certify that on October 16, 2023, I electronically filed the following document with the Clerk of the Court by using the CM/ECF system:

OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished electronically by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct.

Executed on October 16, 2023, at San Francisco, California.

Vanessa Jordan
Declarant

Vanessa Jordan
Signature